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Supreme Court, U.S.
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No. 00-1300

In The

Supreme Court of the United States

DOUGLAS PAUL DODGE,

Petitioner,

v.

KATHRYN LUCILLE AND DONALD GRAVILLE,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Arizona, Division One

BRIEF IN OPPOSITION

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JURISDICTION

Question 2 is out of time.

Petitioner's application for a writ of certiorari as to Question 2 is out of time. Question 2 was presented in *Graville v. Dodge*, 195 Ariz. 119, 123, ¶ 15, 985 P.2d 604, 608 (App. 1999) (*"Dodge I"*), and was decided adversely to petitioner on January 28, 1999. The Arizona Supreme Court denied review on September 21, 1999. No petition for certiorari was filed seeking review of *Dodge I*.

Likewise, Question 2 was not raised or addressed in *Graville v. Dodge*, 197 Ariz. 591, 5 P.3d 925 (App. 2000) (*"Dodge III"*):

> [T]his appeal does not address the constitutionality of Arizona's Grandparents' Visitation Rights statute, A.R.S. § 25-409. We addressed that issue in *Dodge I*. . . . Here, our review is limited to determining whether the trial court abused its discretion by modifying the visitation order through the appointment of a supervising psychologist.

197 Ariz. at 600, 5 P.3d at 934 n.2.

Therefore, the petition for writ of certiorari to review Question 2, filed more than sixteen months after the Arizona Supreme Court denied review of *Dodge I*, is untimely. 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.

Question 3 was not preserved below.

Question 3 is not properly before this Court because it was not raised or involved in *Dodge III* or presented in the petition to the Arizona Supreme Court for review of

that opinion (*see* issues presented on petition for review appended hereto). *E.g., Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

STATEMENT OF THE CASE

Respondents hereby incorporate the facts recited in the opinions below (*Dodge I, II and III*).

REASONS WHY THE PETITION SHOULD BE DENIED

1. An order for supervised visitation does not unconstitutionally infringe a parent's right of custody and control.

Petitioner misapprehends the Hendrix Order. Nowhere does it order Dr. Block "to intervene in the relationship of a parent and child in order to alter the child's attitude concerning [their grandparents]," as petitioner argues. Instead, finding that "[respondents'] attempts to have and maintain a relationship with their grandchildren have been successfully thwarted by the [petitioner]," the Hendrix Order merely appointed Dr. Block, as authorized by A.R.S. § 25-410(b):

> to exercise continuing supervision over this case to assure that the visitation orders are complied with and to provide therapeutic intervention so that a relationship between the children and grandparents can become a possibility, if not a reality.

Hendrix Order, ¶ 1.

Rejecting petitioner's interpretation of the Hendrix Order and his argument of unconstitutionality based on that misinterpretation, the Arizona Court of Appeals explained that the order "simply appoints a therapist to supervise and facilitate the visits to ensure the least amount of disturbance to the children." 197 Ariz. at 598, ¶ 23, 5 P.3d at 932. In other words, a proper reading of the order defeats any argument of unconstitutionality.

Parham v. J.R., 442 U.S. 584 (1979), the only authority cited by petitioner, is inapposite. *Parham* involved the constitutionality of procedures for admitting a minor child to a state mental health care facility, not the impact of supervised visitation on a parent's rights. Neither is any language from *Parham* supportive of petitioner's argument. In fact, petitioner's purported quote from Parham is incomplete, inaccurate, out of context, and a blending of passages from pages 601-602 and 604 of the opinion. An accurate quotation of those passages reveals their irrelevance to this case:

> We next deal with the interests of the parents who have decided, on the basis of their observations and independent professional recommendations, that their child needs institutional care. Appellees argue that the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents' traditional interest in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment.

442 U.S. at 601-602.

> In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.

442 U.S. at 604.

Finally, to the extent that the Hendrix Order affected petitioner's custody and control of his children, it was justified and is not unconstitutional because the presumption that petitioner, as a fit parent, was acting in the best interests of his children had been burst. Indeed, the Hendrix Order found that petitioner's "conduct and attitude towards the [respondent grandparents] is based on his own personal agenda without regard to the best interest of the children." Hendrix Order, finding 7(a).

2. Arizona's grandparents' visitation statute is unlike the statute in *Troxel*, and is constitutional.

After this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), the Arizona Court of Appeals re-examined the constitutionality of Arizona's grandparents' visitation

statute and reaffirmed its earlier holding in *Dodge I* that A.R.S. § 25-409 is constitutional. *Jackson v. Tangreen*, No. 1 CA-CV 99-0542, 2000 WL 1873228 (Ariz. App., filed Dec. 26, 2000). If this Court elects to consider the constitutionality of Arizona's grandparents' visitation statute, although not timely presented, respondents adopt the reasoning of *Jackson v. Tangreen*:

> Two factors support our conclusion that the Supreme Court's holding in *Troxel* has no impact on A.R.S. section 25-409. First, although the Court found the Washington statute's language too broad to pass constitutional muster, it refused to find nonparental visitation statutes unconstitutional per se. *Id.* [530 U.S. at 73.]
>
> Second, A.R.S. section 25-409 is much more narrowly drawn than the Washington statute in *Troxel*. In contrast to the Washington law, Arizona's nonparental visitation statute is limited to grandparents and great-grandparents. A.R.S. § 25-409(A), (B). In addition, the court may order visitation over parental objections only if the marriage of the parents has been dissolved for at least three months, one of the parents of the child is deceased or missing, or the child was born out of wedlock. *Id.* at (A)(1)-(3). Further, the statute requires the court to evaluate "all relevant factors" as well as five specific factors to determine if visitation serves the best interests of the child. *Id.* at (C)(1)-(5). Thus, A.R.S. section 25-409 stands in stark contrast to the "breathtakingly broad" Washington statute. *Troxel*, 530 U.S. at ___, 120 S.Ct. at 2061.

* * *

We believe Arizona's statute does not exceed the "bounds of the Due Process Clause." Section 25-409 requires Arizona courts to give weight to the parent's visitation decisions. For example, the court must assess "[t]he motivation of the person denying visitation." A.R.S. § 25-409(C)(3). It must also consider "[t]he motivation of the requesting party" and "[t]he historical relationship, if any, between the child and the person seeking visitation." *Id.* at (C)(1), (2). Also, the court must assess the amount of visitation requested and determine the impact that the visitation will have on the child's customary activities. *Id.* at (C)(4). As we concluded in *Graville*, these procedural safeguards "show[ ] that the legislature was conscious of parents' superior right to the custody and care of their children." 195 Ariz. at 127, 985 P.2d at 612 (quoting *West v. West*, 294 Ill.App.3d 356, 228 Ill.Dec. 794, 689 N.E.2d 1215, 1221 (Ill.App.Ct.1998)). Moreover, as subsections (C)(1) through (C)(4) suggest, our statute applies only in cases in which a parent has denied visitation, not merely limited it. Thus, by applying the statute as written, Arizona courts do not violate the Due Process Clause.

Because *Troxel* does not stand for the proposition that nonparental visitation statutes are per se unconstitutional, and because A.R.S. section 25-409 satisfies the due process concerns identified in *Troxel*, we reaffirm our holding in *Graville* that A.R.S. section 25-409 is constitutional.

3. The rights of the children's stepmother are not at issue in this action to enforce the visitation order against petitioner.

A review of the factual and procedural history of the parties' litigation betrays petitioner's argument regarding the rights of the children's adoptive mother as the false issue it is. Because petitioner was ordered to allow respondents visitation with the children before their stepmother adopted them, that order was unaffected by the adoption, and all proceedings and appeals subsequent to that order have concerned only its enforcement as to petitioner; those proceedings and appeals have properly never involved the adoptive mother.

At the time of trial on respondents' petition seeking visitation with their grandchildren, the children's stepmother had not yet adopted them. 195 Ariz. at 122, 985 P.2d at 607 n.1. "In April 1998, while the appeal in *Dodge I* was pending, . . . the children were legally adopted by their stepmother." *Dodge v. Superior Court (Graville)*, No. 1 CA-SA 99-0235 (Ariz. App., filed Nov. 26, 1999) ("*Dodge II*"). Respondents' visitation rights did not terminate upon adoption of the children by their stepmother. A.R.S. § 25-409(F).

In *Dodge I*, petitioner challenged the constitutionality of Arizona's grandparents' visitation statute and the amount of visitation awarded to respondents. However, he did not argue that the statute violated the rights of the adoptive mother.

While *Dodge I* was pending, respondents petitioned the trial court for an order finding petitioner in contempt for violating the Keppel Order awarding the respondents

visitation rights. After being found in contempt by the Hendrix Order, petitioner challenged that finding by a special action in which he argued, *inter alia*, that respondents' "visitation rights were terminated by operation of law when the children were adopted by their stepmother." *Dodge II*. However, he made no argument putting the rights of the children's adoptive mother at issue in the special action. *See Dodge II*.

Finally, petitioner's direct appeal from the Hendrix Order only challenged its provisions regarding continuing supervision of the Keppel Order. That appeal, and the resulting opinion (*Dodge III*) which is now before this Court, did not involve the rights of the adoptive mother.

CONCLUSION

For these reasons, the respondents Kathryn Lucille and Donald Graville respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Arizona Court of Appeals filed in this case on May 23, 2000, review of which was denied by the Arizona Supreme Court on December 5, 2000.

Respectfully submitted,

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ARIZONA REVISED STATUTES

§ 25-409. Visitation rights of grandparents and great-grandparents

A. The superior court may grant the grandparents of the child reasonable visitation rights to the child during his minority on a finding that the visitation rights would be in the best interests of the child and any of the following are true:

1. The marriage of the parents of the child has been dissolved for at least three months.

2. A parent of the child has been deceased or has been missing for at least three months. For the purposes of this paragraph, a parent is considered to be missing if the parent's location has not been determined and the parent has been reported as missing to a law enforcement agency.

3. The child was born out of wedlock.

B. The superior court may grant the great-grandparents of the child reasonable visitation rights on a finding that the great-grandparents would be entitled to such rights under subsection A if the great-grandparents were grandparents of the child.

C. In determining the child's best interests the court shall consider all relevant factors, including:

1. The historical relationship, if any, between the child and the person seeking visitation.

2. The motivation of the requesting party in seeking visitation.

3. The motivation of the person denying visitation.

4. The quantity of visitation time requested and the potential adverse impact that visitation will have on the child's customary activities.

5. If one or both of the child's parents are dead, the benefit in maintaining an extended family relationship.

D. If logistically possible and appropriate the court shall order visitation by a grandparent or great-grandparent to occur when the child is residing or spending time with the parent through whom the grandparent or great-grandparent claims a right of access to the child. If a parent is unable to have the child reside or spend time with that parent, the court shall order visitation by a grandparent or great-grandparent to occur when that parent would have had that opportunity.

E. A grandparent or great-grandparent seeking to obtain visitation rights under this section shall petition for these rights in the same action in which the parents had their marriage dissolved or by a separate action in the county where the child resides if no action for dissolution has been filed or the court entering the decree of dissolution no longer has jurisdiction.

F. All visitation rights granted under this section automatically terminate if the child has been adopted or placed for adoption. If the child is removed from an adoptive placement, the court may reinstate the visitation rights. This subsection does not apply to the adoption of

the child by the spouse of a natural parent if the natural parent remarries.

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§ 25-410. Judicial supervision

A. Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health, care and religious training, unless, upon motion by the noncustodial parent, the court, after hearing, finds that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

B. If either parent requests the order, or if all contestants agree to the order, or if the court finds that in the absence of the order the child's physical health would be endangered or his emotional development significantly impaired, and if the court finds that the best interests of the child would be served, the court shall order a local social service agency to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out. At the discretion of the court, reasonable fees for the supervision may be charged to one or both parents, provided that the fees have been approved by the supreme court.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DOUGLAS PAUL DODGE, Petitioner, v. THE HONORABLE CHERYL K. HENDRIX, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, DON and LUCILLE GRAVILLE, Real Parties in Interest.	1 CA-SA 99-0235 DEPARTMENT E MEMORANDUM DECISION (Not for Publication – Rule 7(i), Arizona Rules of Procedure for Special Actions; Rule 28, Arizona Rules of Civil Appellate Procedure) (Filed Nov. 26, 1999)

Appeal from the Superior Court of Maricopa County

Cause No. DR 97-90192

The Honorable Cheryl K. Hendrix, Judge

JURISDICTION ACCEPTED IN PART, DECLINED IN PART; RELIEF DENIED

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RYAN, Judge

¶ 1 In this special action, Douglas Paul Dodge challenges the trial court's order (the "Hendrix Order") finding him in contempt of court and sanctioning him for his wilful violation of a prior order (the "Keppel Order") granting visitation rights to Don and Lucille Graville with their granddaughters, Dodge's minor children. For the reasons set forth below, we accept special action jurisdiction in part and decline it in part. We deny relief, but modify the court's sanction.

Factual and Procedural Background

¶ 2 A discussion of the early factual and procedural history of this case appears in *Graville v. Dodge*, 287 Ariz. Adv. Rep. 68 (App. 1999), *review denied, Graville v. Dodge*, No. CV-99-0091-PR (June 16, 1999) (*Dodge I*). We include here only the facts that are essential to our determination of this special action.

¶ 3 In January 1998, the Keppel Order awarded the Gravilles visitation rights with their granddaughters, Dodge's minor children. This order placed various requirements on the parties, including that Dodge allow the Gravilles to visit with the children at least twice a month for four to eight hours at a time and that both Dodge and the Gravilles notify each other at least three days before changing their addresses or telephone numbers. Dodge appealed the Keppel Order, and we affirmed it with modifications concluding that the court could not require Dodge to: (1) encourage the children to call the Gravilles on a weekly basis; (2) consider the Gravilles as alternate care-givers; or (3) refrain from discussing custody issues with the children. *See Dodge I*, 287

Ariz. Adv. Rep. at 74, ¶ 59. We affirmed the visitation and notification terms. *See id.*

¶ 4 In April 1998, while the appeal in *Dodge I* was pending, the Gravilles petitioned the trial court for an order finding Dodge in contempt for violating the Keppel Order. That same month, the children were legally adopted by their stepmother.

¶ 5 After a hearing, the court found Dodge in contempt and entered the Hendrix Order. This order included several findings of fact on which the trial court based the order, but only three are relevant to this special action: (1) Dodge thwarted the Gravilles' visitation attempts, (2) Dodge failed to notify the Gravilles of his changed address and telephone number, and (3) Dodge did not encourage the children to telephone the Gravilles.

¶ 6 Dodge asked the court to reconsider its contempt finding. Although the motion for reconsideration is not in this record, it appears from the court's minute entry that Dodge complained that the Keppel Order was vague and that its term ordering him to encourage telephone contact had been held unconstitutional on appeal. The trial court explained that Dodge was not in contempt for failing to encourage the children to call the Gravilles, but rather for not allowing the Gravilles to visit with the children. After Dodge filed a motion for clarification and asked the court to reopen the matter, the court specifically said that Dodge was in contempt for failing to allow the Gravilles to visit with the children twice each month for four to eight hours at a time.

¶ 7 In the Hendrix Order, the trial court included some terms as the means for Dodge to purge his contempt, and

some terms that did not mention his contempt at all. The court appointed a supervisor to ensure that the visitation orders were carried out and to provide counseling to help re-establish the relationship between the children and the Gravilles, and divided the cost of the supervised visits and counseling between the parties, with Dodge to pay seventy-five percent and the Gravilles twenty-five percent. These terms did not mention Dodge's contempt. On the other hand, to purge his contempt the court ordered Dodge to schedule the first supervised visit within thirty days of the order, notify the Gravilles of it, make sure the children attended, and pay his part of the costs in a timely manner. In addition, the court restated part of the Keppel Order as a condition for Dodge to purge his contempt - Dodge had to allow the Gravilles access to the children twice each month for four to eight hours each time, for two days during the winter recess, and on a three-day weekend during the summer. Finally, the Hendrix Order awarded the Gravilles their attorneys' fees.

¶ 8 Dodge challenges the entire Hendrix Order in this special action. However, he has also appealed two parts of the Hendrix Order that he claims modify the earlier Keppel Order: (1) the appointment of Dr. Robert Block, Ph.D., to supervise the visitation and provide therapeutic intervention with the parties to divide the costs, and (2) the requirements surrounding how Dodge must schedule appointments with Dr. Bock and communicate the schedule to the Gravilles.

Discussion

I. *The Contempt Finding*

¶ 9 Judge Hendrix found Dodge is contempt of court for violating the Keppel Order. In Arizona, "orders adjudicating whether a person should be held in contempt for refusing to obey a court order are not appealable." *Elia v. Pifer*, 277 Ariz. Adv. Rep. 8, 14, ¶ 30, 977 P.2d 796, 802, ¶ 30 (App. 1998). As a result, Dodge has no equally adequate remedy by direct appeal of the contempt finding and we accept special action jurisdiction over his challenge to that part of the Hendrix Order. *See* Ariz. R.P. Special Actions 1(a); *Elia*, 277 Ariz. Adv. Rep. at 14, ¶ 30, 977 P.2d at 802, ¶ 30.

¶ 10 Dodge first argues that the Hendrix Order is unconstitutional because it is based in part on Dodge's failure to encourage the children to telephone the Gravilles. Because we held this term unconstitutional, Dodge argues that the entire Hendrix Order is tainted and must be quashed. However, a trial court's order is not invalid merely because it partially rests on findings that cannot by themselves support the ultimate judgment. *See Minderman v. Perry*, 103 Ariz. 91, 93, 437 P.2d 407, 409 (1968). "We will affirm the trial court's judgment if the result was legally correct for any reason." *Hale v. Amphitheater Sch. Dist. No. 10*, 192 Ariz. 111, 114, ¶ 5, 961 P.2d 1059, 1062, ¶ 5 (App. 1998) (quoting *General Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992); *Minderman*, 103 Ariz. at 93, 437 P.2d at 409.

¶ 11 Here, the trial court had a valid basis for finding Dodge in contempt. Although parts of the Keppel Order were invalidated on appeal, the trial court held Dodge in

contempt for violating parts that were valid. The court clarified the Hendrix Order in two minute entries, explaining that Dodge was not in contempt for violating anything that had been stricken from the Keppel Order. Instead, Dodge was in contempt because "[h]e did not allow the maternal grandparents to have access to their grandchildren at least twice a month for four to eight hours each time." This part of the Keppel Order was affirmed on appeal. Because the trial court found Dodge in contempt for violating this part of the Keppel Order and the evidence supports that finding, we deny relief from the contempt finding on this ground.

¶ 12 Dodge also argues that the trial court lacked jurisdiction to issue the Hendrix Order because Dodge's appeal from the Keppel Order was pending at the time. Dodge claims that the trial court's jurisdiction extended only to orders in direct furtherance of the pending appeal. Although Dodge's argument is unclear, he apparently believes that his pending appeal alone was enough to render the trial court powerless to enforce the Keppel Order. We disagree.

¶ 13 Judgments in cases involving the custody of children cannot be stayed on appeal except by an order of the appellate court. *See* Ariz. R. Civ. App. P. 7(a)(1) (stating that automatic stays granted on the filing of a supersedeas bond do not apply to child custody cases); Ariz. R. Civ. App. P. 7(c) (stating that Rule 7 does not limit the power of the appellate courts to stay proceedings during the pendency of appeal). Arizona courts view visitation as "a limited form of custody or a limitation upon the custody rights of another." *Finck v. O'Toole*, 179 Ariz. 404, 406, 880 P.2d 624, 626 (1994) (quoting *Bryan v. Bryan*, 132

Ariz. 353, 355, 645 P.2d 1267, 1269 (App. 1982)). Therefore, visitation orders are not stayed on appeal except by order of the appellate court. Although Dodge requested a stay from this court while he appealed the Keppel Order, his request was denied. The Keppel Order remained valid and enforceable during the pendency of the appeal.

¶ 14 Alternatively, Dodge argues that the trial court had no jurisdiction to find him in contempt because the Gravilles's visitation rights were terminated by operation of law when the children were adopted by their stepmother. The Keppel Order granted visitation rights to the Gravilles under Arizona Revised Statutes Annotated ("A.R.S.") section 25-409, which permits the court to award grandparents' visitation rights when it would be in the best interests of the child and a parent of the child is deceased. *See* A.R.S. § 25-409(A)(2). Although grandparents' visitation rights are not permanent and "automatically terminate if the child has been adopted or placed for adoption," automatic termination "does not apply to the adoption of the child by the spouse of a natural parent if the natural parent remarries." *Id.* § 25-409(F). Dodge remarried, and his spouse adopted the children. Under the statute's plain language, the Gravilles' visitation rights did not terminate when the children were adopted by their stepmother.

¶ 15 Dodge relies on prior decisions of this court that held that A.R.S. section 25-409(F), or its predecessor A.R.S. section 25-337.01, terminated grandparental visitation rights on the adoption of the grandchild. However, these cases either were overruled by an amendment to the statute or are distinguishable. For example, in *In re Marriage of Herreras*, this court found that the version of

A.R.S. section 25-409 in effect at the time terminated a grandmother's court-ordered visitation rights when the grandchild subsequently was adopted by the stepmother. *See* 159 Ariz. 511, 512, 768 P.2d 673, 674 (App. 1989). But the statute was amended in 1992, and its current version protects grandparents from the automatic loss of court-ordered visitation rights if the child is adopted by a stepparent. *Compare* A.R.S. § 25-337.01 (1988) *with* A.R.S. § 25-409(F); *see also* A.R.S. § 25-409(F) (historical and statutory notes). Therefore, our holding in *Marriage of Herreras* that adoption by a stepmother terminates grandparental visitation rights no longer controls.

¶ 16 Another example is *In re Appeal In Maricopa County Juvenile Action No. JA-502394*, 186 Ariz. 597, 925 P.2d 738 (App. 1996). That case dealt with a natural grandmother's visitation rights after her grandchild had been adopted by the natural grandfather and stepgrandmother. *See id.* at 598, 925 P.2d at 739. After the adoption, the natural grandmother petitioned for visitation rights but the trial court dismissed her petition because she had no legal basis on which to claim visitation rights. *See id.*

¶ 17 On appeal, we affirmed the dismissal. *See id.* The natural grandmother had petitioned for visitation under a part of A.R.S. section 25-337.01 that required the child to be born out of wedlock. *See id.* at 598-99, 925 P.2d 739-40. However, under a separate statute, the intervening adoption gave the child the same legal status as if she had been a natural child of the grandfather and stepgrandmother. *See id.* at 599, 925 P.2d at 740. Because the child no longer was legally born out of wedlock, any visitation rights the natural grandmother might have

asserted were superseded by the child's post-adoption legal status. *See id.*

¶ 18 We addressed a similar situation in *Guethe v. Truscott*, 185 Ariz. 29,912 P.2d 33 (App. 1995). There, after the child's parents divorced, the natural father voluntarily relinquished his parental rights. *See id.* at 30, 912 P.2d at 34. The natural mother remarried, and the child was adopted by the stepfather. *See id.* Two years later, the child's natural paternal grandmother petitioned for visitation rights which the trial court granted. *See id.*

¶ 19 The court reversed the trial court's visitation order. *See id.* Relying on the last sentence of A.R.S. section 25-337.01(D), now A.R.S. section 25-409(F), we found that the child's adoption by the stepfather prevented the trial court from subsequently awarding visitation rights to the grandparent. *See id.* In such a case, Arizona statutory law left the question of grandparental visitation solely within the discretion of the parents. *See id.; see also Maricopa County Juvenile Action No. JA-502394*, 186 Ariz. at 599, 925 P.2d at 740.

¶ 20 In both *Maricopa County Juvenile Action JA-502394* and *Guethe*, we held that the grandparent had no legal visitation rights with the grandchild. But, in each case, the grandparent was seeking visitation rights *after* the child had been adopted. Such is not the case here. The Keppel Order awarded visitation rights to the Gravilles *before* the children's stepmother adopted them and so the last sentence of A.R.S. section 25-409(F) applies. The Gravilles did not lose their court-ordered visitation rights because of the subsequent adoption nor did the trial court lose its jurisdiction to enforce them.

¶ 21 Dodge thus violated a valid and enforceable court order. The court was not divested of jurisdiction to enforce that order by the pending appeal, nor did the adoption of the children by their stepmother terminate the Gravilles's court-ordered visitation rights. Therefore, we deny relief from the court's finding that Dodge was in contempt.

II. *The Contempt Penalty*

¶ 22 Contempt is either criminal or civil, direct or indirect, depending on the circumstances. *See Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966).

> "[C]riminal contempt is the commission of a disrespectful act directed at the court itself which obstructs justice; civil contempt is the disobeyance of a court order directing an act for the benefit or advantage of the opposing party to the litigation; direct contempt is an act committed in the presence of the court or so near thereto as to obstruct the administration of justice; and constructive or indirect contempt is an act committed outside the presence of the court."

Id. (citations omitted). Although the Hendrix Order does not characterize Dodge's contempt as either civil or criminal, direct or indirect, Dodge committed indirect civil contempt. He wilfully disobeyed the court's valid order directing him to perform certain acts for the Gravilles's benefit and in the children's best interests.

¶ 23 The nature of the contempt determines the purpose of the sanction. In civil contempt, the sanction "is usually

considered to be remedial . . . [and it] is designed to enforce compliance with a court order. For that reason, civil contempt punishment is conditional and must be lifted if the contemnor obeys the order of the court." *Johnson v. Johnson*, 304 Ariz. Adv. Rep. 25, 26, ¶ 13 n.2 (App. 1999) (quoting *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980)).

¶ 24 In challenging his contempt sanction, Dodge first claims that the trial court exceeded its authority by ordering continuing supervision of the Keppel Order, counseling for the parties, and dividing the costs of the supervision and counseling between them. We conclude that this part of the Hendrix Order was not a sanction for Dodge's contempt, but a modification of the Keppel Order. Supervision and counseling may assist Dodge in complying with the Keppel Order in the future, but they have no coercive effect to compel his compliance. Although the trial court may have been motivated to order supervision and counseling because of Dodge's contempt, the court included no language in this part of the order indicating that it was a sanction for contempt. Because we view this term as modifying the Keppel Order, the proper avenue for review of this decision is by direct appeal, which is pending, and we decline further review of this part of the Hendrix Order in this special action.

¶ 25 Dodge also objects to terms that the trial court imposed as contempt sanctions. For example, the trial court ordered Dodge to contact the visitation supervisor within thirty days to schedule the first appointment, and to communicate the date and time to the Graville's within twenty-four hours thereafter. The supervisor would

schedule subsequent visits and communicate them to the Gravilles, but Dodge had to make the children available for the scheduled visits and pay his part of the costs in a timely fashion. The court also recast the total visitation required by the Keppel Order as a means for Dodge to purge his contempt.

¶ 26 The scheduling and payment requirement is ongoing, and the Hendrix Order does not provide for it to end if Dodge complies with the terms of the Keppel Order. Similarly, the amount of visitation that Dodge must allow is described in periodic, ongoing terms, and there is no provision that it ends upon compliance with the Keppel Order. As such, neither is an appropriate sanction for Dodge's contempt. *See, e.g., Johnson*, 304 Ariz. Adv. Rep. at 26, ¶ 13 n.2. Therefore, insofar as these terms in the Hendrix Order purport to be contempt sanctions they are invalid as such, and we modify them to strike the trial court's language ordering Dodge to comply with them to purge his contempt. However, insofar as scheduling and payment facilitates supervised visitation, and the amount of visitation restates what we affirmed in *Dodge I*, we decline special action jurisdiction because these terms as modified do not adjudicate contempt and therefore may be appealed. *See Elia*, 277 Ariz. Adv. Rep. at 11, ¶ 30, 977 P.2d at 802, ¶ 30.

¶ 27 The Hendrix Order also included an award to the Gravilles of their reasonable attorneys' fees. The Gravilles brought this contempt proceeding to enforce the Keppel Order which granted them visitation rights under A.R.S. section 25-409. In any action under A.R.S. chapter 25, the court may award fees. *See* A.R.S. § 25-324; *see also Brooks v. Consolidated Freightways Corp.*, 173 Ariz. 66, 70-74, 839

P.2d 1111, 1115-19 (App. 1992) (affirming attorneys' fees awarded in a contempt proceeding under A.R.S. § 12-2454 (1956), renumbered as A.R.S. § 25-504 (1996)). Therefore, we accept jurisdiction and deny relief as to the trial court's award to the Gravilles of their attorneys' fees.

III. *Fundamental Error*

¶ 28 Dodge finally argues that the trial court committed various errors that are not reversible individually, but cumulatively rise to the level of fundamental error. Specifically, Dodge complains that there was no evidence of contempt, that the court failed to consider Dodge's defense, that the court did not separate its finding into constitutional and unconstitutional elements, and that the court abused its discretion by not allowing closing arguments and finding him in contempt without evidence. We find no merit in these claims.

¶ 29 "Fundamental error is that which goes to the very foundation of a case, or takes an essential right from a party, or deprives a party of a fair trial." *Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 176 Ariz. 383, 387, 861 P.2d 668, 672 (App. 1993) (citations omitted). But, "[w]e recognize that the 'fundamental error' doctrine should be used sparingly, if at all, in civil cases." *Williams v. Thude*, 188 Ariz. 257, 260, 934 P.2d 1349, 1352 (1997).

¶ 30 Here, the testimony supported the court's finding that Dodge had prevented the Gravilles from seeing their granddaughters twice each month for four to eight hours at a time, and that Dodge had not told the Graville's of

his changed address and telephone number, as required by the visitation order. Dodge provides only one brief excerpt from the record and no argument or citation to authority showing that the court erred by failing to consider Dodge's defense or hear closing arguments. Therefore, we reject these claims. *See* Ariz. R. Civ. App. P. 13(a)(6); *Paros v. Hoemako Hosp.*, 140 Ariz. 335, 338, 681 P.2d 918, 921 (App. 1984); *Coggins v. Wright*, 22 Ariz. App. 217, 219, 526 P.2d 741, 743 (1974). We have already explained the valid basis for the Hendrix Order. Therefore, we find no fundamental error.

Conclusion

¶ 31 For the reasons stated above, we accept special action jurisdiction and deny relief from the trial court's finding that Dodge was in contempt of court and from its award to the Gravilles of their attorneys' fees. We modify the contempt order by striking the language imposing terms in the order as penalties for contempt. We decline special action jurisdiction to review the Hendrix Order in any other respect. Under A.R.S. section 25-324, we award the Gravilles their reasonable attorneys' fees incurred on this special action upon compliance with Arizona Rules of Procedure for Special Actions 4(g) and Arizona Rules of Civil Appellate Procedure 21.

/s/ Michael D. Ryan
MICHAEL D. RYAN, Judge

CONCURRING:

/s/ Sheldon H. Weisberg
SHELDON H. WEISBERG, Presiding Judge

/s/ E.G. Noyes, Jr.
E.G. NOYES, JR., Judge

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

KATHRYN LUCILLE GRAVILLE and DONALD GRAVILLE, Petitioners-Appellees, v. DOUGLAS PAUL DODGE, Respondent-Appellant.	Case No.: 1-CA-CV 99-0582 (Maricopa County Superior Court Case No. DR97-90192)

PETITION FOR REVIEW

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Appellant Douglas Paul Dodge ("Dodge" or "Appellant") petitions the Supreme Court of Arizona to review the decision of the Arizona Court of Appeals in this matter. The Court of Appeals rendered its Opinion in this matter on May 23, 2000, a copy of which is included as Appendix I.

I. ISSUES PRESENTED FOR REVIEW

(Nos. 1 through 6 and 8 were reviewed by the Court of Appeals; Nos. 7, 9 and 10 were not reviewed by the Court of Appeals:)

1. Is the Hendrix Order vague and impossible to interpret, apply, or enforce? What does it authorize a court-appointed "intervention" psychologist to do and what limits does it place on his scope of action?

2. Did the Trial Court properly rely on ARS § 25-410 for authority to appoint Dr. Block the "Intervention" psychologist? Does this statute, which is crafted for other situations, apply to grandparent visitation? If it does apply in theory, did the court make the required requisite findings to invoke this statute?

3. Is there any other statute for state sponsored psychological intervention in the context of a grandparent vs. parent dispute?

4. Is the portion of the Order dealing with Dr. Block (the "intervention" psychologist) an unconstitutional infringement on the parent's (Appellant's) fundamental right to custody and control?

5. Is the portion of the Order dealing with Dr. Block (the "intervention" psychologist) an unconstitutional infringement on the children's right to be free of state-sponsored thought control?

6. Does the portion of the Order dealing with Dr. Block ("intervention" psychologist) improperly delegate the Court's authority to make and craft orders by giving the "intervention" psychologist unfettered discretion to

decide what actions to take in accomplishing the Court's stated purpose?

7. Does the Court of Appeals' Decision in this case represent an impermissible intrusion across the bright line between judicial and legislative powers as defined by the Arizona Constitution?

8. Did the Court of Appeals, when it found that the threshold requirements for ARS § 25-410(B) had been met, make a finding of fact which the trial court had already declined to do and for which, in any case, there exists no supporting evidence in the record?

9. Does the timely release of the United States Supreme Court Opinion in *Troxel v. Granville* No. 99-138 (argued January 12, 2000; decided June 5, 2000) void the appeals court action since the Keppel and Hendrix court failed to provide Dodge with due process as defined by USSC opinion.

10. Are ARS § 25-409 and both ARS § 25-414 and ARS § 25-410 in any application in third party disputes, facially unconstitutional because none of these statutes provide for proper "special weight" to a fit parent's opinion of what is in the best interests of the children.

* * *